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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 440

THE OHIO OIL COMPANY,

Appellant,

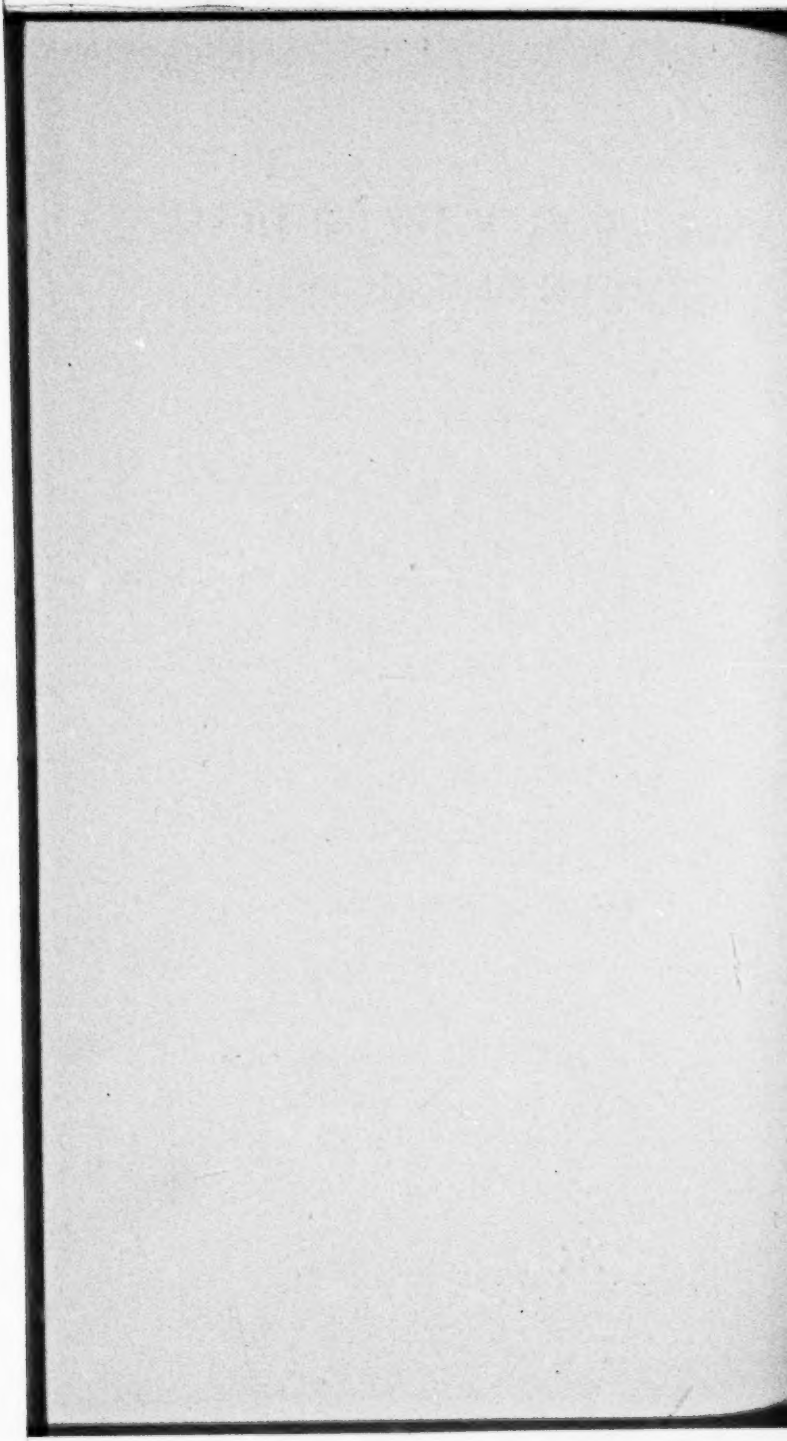
versus

E. A. CONWAY, SUPERVISOR OF PUBLIC ACCOUNTS OF THE STATE OF LOUISIANA.

PETITION FOR REHEARING.

S. L. HEROLD,
SUMTER COUSIN,
ROY L. BENOIT,
Counsel for Appellant.

MONTGOMERY-ANDREE PRINTING CO. INC., 430-432 CHARTRES, N.O.



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To the Honorable the Supreme Court of the United States:

In the above styled and numbered cause, comes now The Ohio Oil Company, the appellant, and prays for a rehearing, alleging as grounds therefor error on the part of this Honorable Court in the opinion handed down on April 14, 1930:

1.

In holding that the provisions of Act 5 of 1928 were not violative of the provisions of Section 21 of Article X

of the Constitution of Louisiana, in that the severance tax is levied neither according to value nor to quantity.

2.

In holding that the discrimination effected by the aforesaid act of the Louisiana Legislature is not violative of the equal-protection clause of the Fourteenth Amendment.

In support hereof, petitioner shows:

1.

AS TO THE STATE CONSTITUTION.

It has long since been settled that, where the validity of a State statute under a State Constitution has never been settled by the State courts, and is presented to this Court in a case within its jurisdiction, it will be decided here as an original question.

Dawson v. Kentucky Dist. Co., 255 U. S. 288, 296.

The question here raised has never been presented to the State courts, and therefore appears to call for original decision by this Court.

The State Constitution requires that the tax be levied according to value or quantity. Manifestly it was not levied according to value. It could be said to be according to quantity only if, as held by this Court, "oils of different classes are treated for the purpose of the tax as being in effect different commodities."

Plainly, however, a mere statement by the State Legislature that things which are the same are different does not make them different. A primary purpose of the Fourteenth Amendment is to prohibit just such arbitrary emanations of legislative power. The very essence of the equal-protection clause is the prevention of the use of State power to make by statute differences which do not in fact exist. These constitute what this Court has hitherto uniformly held to be arbitrary classifications.

The statute does not exact different specific taxes on different **kinds** of oil. It does not vary its specific exactions according to content or utility. The "different commodities" are principally oils of the same kind, happening to be of different gravities. The appellant, producing oils of varying gravities in the same fields, pays upon its production specific taxes at varying rates according neither to value nor to quantity, but according to a schedule purporting to be based upon relative weight; or, to put it otherwise, according to gasoline content. But a tax according to weight or to gasoline content is not a tax according to quantity. The only means by which the tax in question may be styled one according to quantity is by the adoption of the conclusion that oils within the several brackets of the schedule are different commodities, and that the tax is according to quantity as respects each such separate commodity.

But it is most respectfully submitted that the Legislature cannot by its decree that all oils produced within

the State constitute six different commodities make six different things out of a product substantially uniform except as to varying gasoline content. Certainly there is nothing in the record to suggest a basis for the treatment as different commodities of the classes of oil arbitrarily created by the statute. The Court's decision would hold that all oils under 28 gravity constitute a particular commodity, regardless of origin, composition or utility; that all oils between 28 and 31 gravity constitute another commodity; and likewise as to all oils between 31 and 32 gravity, all those between 32 and 36, all those between 36 and 43, and, lastly, all those above 43 gravity.

The same legislature which with its fiat divided all the oils in the State into six separate commodities plainly might have made a greater variety of classes, or it might have classified them differently. In either case, the opinion would have held that the classes thus created were each of separate commodities. In such event, the separate things might have been entirely different from the classes here created. The ultimate effect of the decision, therefore, is that it is competent for the Legislature for no reason other than that of mere gravity to say that any oil within the State constitutes a commodity entirely different from oil of any other gravity, and thus to levy variant and discriminatory specific taxes under a constitution limiting the mode of taxation to quantity or value.

It is submitted that this is not consistent with the plain intent of the State Constitution, expressed in terms

clearly requiring the tax to be levied, if not by value, then according to quantity. In this particular case, there is no uniform tax according to quantity, and the decision is correct only if the legislative fiat be taken as final: that oils of the different gravities named in the schedule are thereby rendered different commodities. And the record abundantly shows, as held by this Court, that the same fields may produce oils of different gravities which are in all respects the same.

2.

AS TO THE EQUAL-PROTECTION CLAUSE.

The tax, admittedly highly discriminatory, may be sustained only, as it was sustained, upon the conclusion that the State might impose a form of taxation upon the oils primarily useful for manufacture of gasoline different from that imposed upon other oils whose value is primarily in the manufacture of lubricants. Or, as stated in the opinion:

> "The State might have concluded not to tax the former at all, and in that case there would have been no constitutional ground of complaint because the tax was laid upon the different oils of the Haynesville, Pine Island and Cotton Valley fields."

This is held to be the effect of *Heisler v. Thomas Colliery Co., 260 U. S. 245, 255.*

But, in the case at bar, the point is not that one kind of oil is taxed and the other exempt, nor that a higher tax is laid upon one kind of oil than upon another. The point here is that the Legislature purports to tax all oils

according to a single standard which, admittedly, as held by this Court, is not common to all; in other words, that the incidence of the tax is made to depend upon a factor entirely removed from common control over value or price.

This Court holds that, as to the paraffine-base oils, values are in a rough degree consistent with gravity changes, but that, as to the coastal oils of South Louisiana, suitable for the production of lubricating oil, value "is determined by viscosity and sulphur content, not by gravity."

The Legislature, however, grades the tax upon all oils according to gravity. The measure of taxation, therefore, in the final analysis, is a factor utterly unrelated to one kind of oil, while controlling as to the other.

The burden of taxation, therefore, upon the exercise by the oil operator of the right of severing oil from the soil is governed entirely by a rule which may or may not be applicable to the receipts or profits from his business. The net result is a necessary discrimination, because that which is chosen as a measure of taxation is a fact which is utterly without common relation to the subject of the tax. And, since the admeasurement of the tax is made to rest upon a factor relating to one kind of oil and not to the other, the adoption of that factor is purely arbitrary.

If, through the arbitrary selection of such standard, gross discrimination is effected as against this appellant, it is submitted that it follows, under settled jurisprudence, that it has the right to complain, and that its complaint is justified, because the very effect of the adoption, as a meas-

ure of the burden of taxation as to all oils, of a factor applicable to one only is the prevention of any substantial equality in taxation. If substantial equality is denied by arbitrary action of the Legislature, it seems to follow that the equal protection of the laws has been refused.

For the reasons above assigned, the petitioner respectfully prays that a rehearing be granted, and that, upon further consideration, the judgment of the District Court be reversed.

Respectfully submitted,

S. L. HEROLD,
SUMTER COUSIN,
ROY L. BENOIT,
Counsel for Appellant.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented and filed in good faith and not for delay, and that a copy of the same has this day been served upon opposing counsel by United States mail.

Shreveport, Louisiana, May 6, 1930.

S. L. HEROLD,
Of Counsel for Appellant.